Copyright Law and technical communications

Warren Singer discusses the application of copyright law to technical communications

Copyright is a form of intellectual property right, which is used to protect the intellectual property of an individual or company. It falls within a class of legal rights which include patents, trademark registrations and design rights. This is a broad subject with many aspects, and so in this article I will focus primarily on copyright as defined by the UK's Copyright Design and Patents Act 1998, and discuss its implications and interpretation for professionals working in the field of technical communications.

A brief history of copyright

The history of copyright dates back to the invention of the printing press in 1476.

The convention of copyright dates back to the invention of the printing press by William Caxton in 1476, which allowed multiple copies of a written work to be reproduced cheaply and quickly. Stationers who printed a work and wanted to protect their rights to exploit it formed a guild and obtained a royal charter from the Crown in 1556. Printed books had to be registered with the Stationer's Company to enjoy protection.

The first copyright law was the Statute of Anne 1709, which gave the sole right to print books to the authors and their assignees, with the emphasis on the commercial exploitation of books by publishers.

Copyright is first of all a property right. Property rights are exclusive rights that prevent third parties from the use and exploitation of the works protected by these rights.

During the 18th and 19th centuries there were two opposing views of copyright in Europe: Britain favoured stronger rights for commercial exploitation by publishers, while countries such as France favoured the *droit d'auteur*, the author's right to exploit their work.

The Berne convention of 1886 provided the foundation for an agreement providing international copyright protection. A personal connection by the author with a member state of the Berne Union or publication in a member state was sufficient to protect the work. The revised 1909 Act gave a work automatic protection upon creation, without the need for any formal registration, for a period of the author's life and 50 years after their death. In the UK, the 1909 changes to the Berne convention were incorporated into the Copyright Act 1911.

Technological developments in the 20th century resulted in new media, such as film and recordings. The UK Copyright Act1956 took these innovations into account, including protection for films, sound recordings, broadcasts and typographical format of published editions.

Not all countries signed up to the Berne convention (notable exceptions were Russia, the US and China). An alternative to the Berne convention, the Universal Copyright Convention (UCC), was first created in 1952 in Geneva, by countries such as the United States. The Universal Copyright Convention is of limited importance today, as most countries are now part of the Union of the Berne Convention. In addition, the UCC gives precedence to the Berne convention.

Major changes were proposed to the Berne convention in the 1960s, but the Stockholm 1967 and Paris 1971 Revisions of the Berne convention included only minor changes.

Currently 165 countries have signed up to the Berne convention. Countries outside the convention enjoy limited, discretionary protection for their authors from member states, provided that this protection is reciprocated.

In the UK, the Copyright Design and Patents Act (CDPA) 1988 incorporated some elements of the moral rights of the author (French *droit d'auteur*) and a new section on Rights in Performances. A new concept of Design Right was introduced.

In 1999 the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) introduced intellectual property law into the international trading system. TRIPS contains a number of requirements that nations' laws must meet to support copyright rights. Since ratification of TRIPS is a compulsory requirement of World Trade Organization membership, any country seeking to obtain easy access to the international markets opened by the World Trade Organization must enact the intellectual property laws mandated by TRIPS.

Copyright is an evolving subject and has changed considerably over the past few centuries. No doubt modern law will continue to evolve in this area.

What are the key features of copyright?

Copyright is first of all a property right. Property rights are exclusive rights that prevent third parties from the use and exploitation of the works protected by these rights.

This protection for an author of the right to make copies of their work and sell or license usage of these copies lies at the heart of copyright.

The features below are as defined by CDPA 1988:

Originality [1]

For copyright to exist a work must be original. A work is original for copyright purposes if it has originated from the author and has not been copied from another work. The author must have used some judgment or skill to create the work — simply copying a work does not make it original (for example, a secretary taking dictation will not obtain the copyright in the written work).

Copyright is subject to the de minimis principle, which provides a low but minimum standard for what can be copyrighted. For example, you cannot copyright a single word, name or title (although these might be protected by other conventions, such as trademark registrations).

Tangibility[2]

Luke Dixon, an associate from the law firm Greenberg Traurig Maher LLP, provides a detailed response to the question of the application of copyright to

Copyright does not protect an idea, but only the particular expression of the idea. The idea must be recorded in a permanent form to be protected (note that ideas can be protected via patents).

It is immaterial whether the work is recorded with the permission of the author.

Qualification[3]

The work must be a qualifying work. Under CPDA 1988, a work will qualify for copyright if the author is a British citizen, domiciled or resident in the UK or a qualifying country or if the work was first published in a qualifying country.
Under the Berne Convention, Universal Copyright convention and Trade related Aspects of Intellectual Property Rights (TRIPs) agreement, the work must be published in a member state, the author of the work must be a citizen of a member state or the first publication must be in a member state.

Types of work that enjoy copyright[4]

Only certain types of works are protected by CDPA 1988. This includes literary, dramatic, musical and artistic work and typographical arrangements in printed work, such as the layout, font and lettering.

- A literary work includes work which is expressed in print or writing, irrespective of its quality. This includes technical documentation.
- An artistic work also includes graphic work (drawing, diagram, map chart or plan), irrespective of the quality.
  Artistic work provides a special problem, because it overlaps with Design Law.
- Typographical arrangements of published editions attract their own copyright. So, the layout, page layout, design, fonts etc in a technical guide can form their own copyright.

Duration[5]

Copyright in most original literary, artistic or creative works is the lifetime of the author (or if the author is unknown, when the work is first made available to the public) plus 70 years. For typographical arrangements in published works, this is 25 years. The term expires at the end of the calendar year.

After copyright expires, the work becomes available for use in the public domain.

First owner of copyright [6]

The person who creates the work is normally the first owner of the copyright.

However, if the work was created in the course of employment, the employer will be the first owner of the copyright.

Employees

If the work is created in the course of employment, the employer owns the copyright – but only if the work was carried out as part of the normal duties of the employee. Using the facilities of the employer does not entitle the employer to copyright if the work was not made in the course of the author's duties as an employee.

A consultant or freelancer who has been

[1] s1 CDPA 1988
[2] s3(2) and 3 CDPA 1988
[3] S154 and 155 CDPA 1988
[4] S1-6 CDPA 1988
[5] S12-15 CDPA 1988
[6] S11(1) and (2) CDPA 1988

commissioned to create a work is not an employee and the commissioner has no automatic right to the copyright. There must be a written assignment of copyright (usually in the contract between commissioner and author). However, in the absence of written assignment, the courts may infer that copyright has been assigned, based on the circumstances.

Assignment of copyright[7]

The first owner of the copyright can assign (transfer) their copyright to a third party or grant a licence for use of the work. Any assignment must be a written assignment and signed by or on behalf of the copyright owner.

Joint ownership[8]

Where two or more authors have collaborated on a work so that it is impossible to identify each author's contribution, this will result in a work of joint ownership. Contributions need not be equal, but all the authors must have intended to create a work.

Providing ideas (for example, verbal descriptions from a subject matter expert) does not constitute joint ownership. Contribution must be significant. Editing, contributing suggestions, ideas or information will not give rise to joint ownership.

The author of a compilation is the person who gathers or organises the material contained within the compilation, while each separate contribution will have its own separate author.

Author's Rights[9]

The *droit d'auteur* were added to CDPA 1988, to give the author certain moral rights over their work, even after it has been sold or licensed. These include:

- Moral rights – to be acknowledged as the author of the work.
- Resale right – economic right to exploit the work; the author can license or transfer their right

Copyright and Technical Communications

Is technical documentation covered by copyright?

I asked specialist solicitor Stephen Gare from the firm Greenberg Traurig Maher LLP whether the Copyright, Designs and Patents Act 1988 was applicable to technical documentation. It seemed to me that the wording in the Act was focussed on other types of material, such as music, artistic works and typographical arrangements n publications and that the peculiar circumstances around the production of technical documentation could not easily be reconciled with the Act. I couldn't find any references to cases that related specifically to technical documentation.

Stephen is co-editor of the well-known Blackstone's Statutes on Intellectual Property. Luke Dixon, an associate at the firm, has kindly replied with a very detailed response, which I have included in full on page 3.

Ten Questions about Copyright

I was interested to see what other technical communicators understood about this subject. In October 2012 I conducted a quick survey on the ISTC email discussion group, with ten basic questions relating to copyright. There were 43 responses. Below is the percentage of responses to each of the questions asked in the survey, together with an answer based on CDPA 1988.

The October 2012 survey asked ten questions related to copyright. Responses are shown here.

Q1. Who owns the copyright for a user guide you have been hired to produce?

- **You do**: 2.5%
- **The company hiring you**: 95%
- **You both do**: 2.5%

A. You always own the first copyright, unless the work was jointly produced together with another author, in which case the copyright would be shared (see question 7 below).

Your contract may state or imply that you agree to assign your copyright or rights to use the material to the commissioning company (that is, you are surrendering your copyright in return for some financial consideration). In certain instances, if there is no written assignment or transfer of ownership, the courts may imply this, depending on the circumstances of the case.

2. How long does copyright last for?

- **20 years**: 22%
- **50 years**: 34%
- **70 years after the death of the author**:

[7] S90 91-94 CDPA 1988
[8] s10(1) CDPA 1988
[9] S77-79 CDPA 1988

44%

A. For an artistic work — documentation falls within this category (see response from Luke) — the period is 70 years after the death of the author. The period would be different for other types of work covered by the Act.

3. Can a company own the copyright for an artistic work?

- **Yes**: 74%
- **No**: 4%
- **It's complicated**: 22%

A. Under S(5) CDPA 1988, a company can own the copyright. However, to prevent monopoly over the material (since a company could last for much longer than the lifespan of a person), the courts may imply a first owner of the copyright, as in employees of the company who produced the work, and the copyright would expire after the prescribed period following their death.

4. Is a document or work from a technical communicator considered an artistic creation as defined by the copyright act?

Yes: 21%
No: 37%
Not sure: 42%

A. Yes. See response from Luke Dixon.

5. If you own the copyright, what does that mean?

Below is a selection of common responses:

- No one can use the item without your permission.
- You control the right to reproduction and distribution.
- That I can transfer the copyright to the company hiring me in exchange for payment of my technical communication services.
- I can bring proceedings in court against an infringement.
- Gives me legally enforceable rights to define how the copyrighted work may be reproduced and distributed.
- Others cannot make copies or reuse substantial parts of text without your permission. (There are exceptions for 'fair use' quoting/copying minor parts)

A. This means literally the right to make copies. For a full answer, see the section *What are the key features of copyright?* on page 1.

6. If you are working for an employer, who owns the copyright of the material you are working on?

The employer does: 76%
You do: 0%
Depends on the circumstances: 24%

A. In general the employer does, however only if the work was created during the course of employment (that is, as part of the employee's normal duties). Using the employer's equipment or their contribution to ideas does not confer copyright on the employer.

7. Can the copyright be owned at the same time by more than one person?

Yes: 47%

No:25%
Not sure: 28%

A. The copyright Act allows for Joint ownership of the copyright. Joint ownership occurs when the contribution of separate authors to a work cannot be separated.

8. Adding a copyright notice to a page in a guide or website automatically protects that page from infringement

Yes: 16%
No: 77%
Not sure: 7%

A. Copyright will apply whether there is a copyright notice or not. In the US, a notice was required to retain copyright on works published before 1st January 1978. However, after the US signed up to the Berne convention, US law was amended, and the use of copyright notices became optional on work published from 1st March 1989. (It is however, a good idea to add a notice, to remind readers that the material is subject to copyright and to identify the copyright owner)

9. Copyright law is universal and applies to all countries

Yes4%
No: 87%
Not sure: 9%

A. Copyright law does not apply to all countries – only to those member states who have signed up to Berne or UCC conventions. Authors from

countries that are not part of these conventions may still enjoy discretionary copyright protection.

10. Copyright also applies to diagrams, photos and other graphic elements in a guide

Yes: 90%
No: 5%
Not sure: 5%
A. Yes, but the new Design Law will now cover these design elements.

Discussion and conclusions

I hope that this article has shed some light on the topic of copyright and its application to technical communications.

Untangling who owns copyright in technical documentation can be a complicated task. Often authors work on company-branded documents, using corporate style guides, company screenshots and extracts from company documents, such as specifications. They work with other authors, editors and contributors. Despite these unique circumstances, authors of technical documentation share similar copyright problems with those faced by other commissioned works, such as film productions.

Further reading on this topic is essential to gain a good understanding of the issues involved in copyright and how these can be applied in practise by the courts.

References

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Christie, A. and Gare, S. (2010) *Blackstone's Statutes on intellectual Property 10th* Edition Oxford University Press.

Torremans, P. and Holyoak,J. (1998) *Intellectual Property Law 2nd Edition* Butterworths.

Internet Resources

www.legislation.gov.uk/ukpga/1988/48/contents

www.copyrightservice.co.uk/copyright

www.cla.co.uk/copyright_information/copyright_information
http://en.wikipedia.org/wiki/Authors%27_rights
www.wipo.int/treaties/en/ip/berne/

Quote from Luke Dixon from Greenberg Traurig Maher LLP

It is likely that the technical documentation will qualify as a "literary" work under the Copyright, Designs and Patents Act 1988 ("CDPA"). A literary work is any work which is written. In fact, a work expressed in words or numerals can be a literary work irrespective of the quality of the work in question. The technical documentation might also comprise charts, graphs etc. These can qualify as "artistic" works, as may photographic images used in the technical documentation. The courts have even been willing to define a circuit diagram as a literary work (although it may almost be regarded as an artistic work).

Copyright will subsist in a work once it is recorded, either in writing or otherwise. Each draft stage of the technical documentation will amount to a new copyright work in its own right. So, even if the draft is not the final published version, it can still enjoy copyright protection. This assumes, of course, that the work ticks all the other boxes for copyright protection (for example: it is an original work, it is the author's intellectual creation etc).

In terms of ownership of copyright, the author is the first owner. Under the CDPA, an author is basically the person who creates the work. The author can include persons who select and gather together concepts, data etc which go into the work. So, this could potentially include editors of a compilation of copyright works.

Where an employee of the organisation creates a copyright work in the course of his employment, the copyright in that work will belong to the organisation as his employer. This will be the case unless there is an express written agreement between the parties to the contrary.

Where two or more persons make contributions to the work that cannot be distinguished from each other, they will be "joint authors" of the work and will be jointly entitled to the copyright in that work. Again, if they are all employees of the organisation, then the organisation will own that copyright, subject to the exception I mentioned.

Where the author of a copyright work comprised in the technical documentation is a freelance contractor, the contractor will in the first instance own that copyright. Commissioners of copyright works from contractors often think that they own the copyright because they have paid for it, but this belief is mistaken. The best course of action for them is to obtain an express written assignment of the work in question from the contractor.

The circumstances can shape who has rights in the copyright in commissioned works. Down the years, the courts have been willing to find that commissioning parties have different levels of rights in commissioned works, from non-exclusive licences up to and including beneficial entitlement to ownership of the copyright. However, these decisions turn on the facts of each particular case, and of course the commissioners will have had to go through a time-consuming and expensive court action to get there. In addition, the facts of a case might not support the view that the commissioner is entitled even to a licence of the copyright. Best practice is to deal with ownership of copyright in a commissioned work upfront and in writing.

So, where there is a breakdown in the relationship between commissioner and contractor, and copyright ownership is not dealt with in their contract, it is possible that the contractor can use its copyright to prevent publication of the copyright work. However, in the absence of any written contractual terms, the facts of the case might support the implication of a term that at least allows the commissioner a licence to publish the copyright work (if not full ownership of the work).

If you want more detail, I recommend you read the following cases which are influential in the area of copyright ownership in commissioned works:

Robin Ray v Classic FM

R Griggs Group Ltd and others v Evans and others

Clearsprings Management Ltd v Businesslink Ltd and another

(1) Laurence John Wrenn (2) Integrated Mutli-Media Solutions Limited v Stephen Landamore

As you will see from the judgments, the courts reached differing decisions in these cases.

Luke Dixon

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